in the

Supreme Court

of the

United States

OCTOBER TERM, 1978

NO. 79-375

MICHAEL GARY WHITMIRE
DONALD JOHN WILLIAMS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CASES

Authorities Cited

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ARGUMENT[1]

The government has misstated and consequently confused two major portions of an already complicated search and seizure issue.[2] First, the government has improperly co-mingled the terms "investigatory stop" and "investigatory stop and boarding". (Brief,[3] 6-8) This requires an analysis of *United States vs. Brignoni-Ponce,* 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), for it is this case which the *government* utilizes to uphold the search. As the government correctly notes (Brief, 8), *Brignoni-Ponce* permits a brief detention, otherwise known as an investigatory stop, to determine an individual's status where reasonable suspicion exists. (See Pet.,[4] 13-14) However, *Brignoni-Ponce* does not sanction the *entry* by police into a vehicle (or onto a vessel) unless probable cause has *first* been established. *Cf. Almeida-Sanchez vs. United States,* 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973); see also, *Dunaway vs. New York,*_____U.S. ____, 99 S.Ct. 2248, 2256 (1979), for the proposition that "any further detention *or search* (after a requested *explanation* of suspicious circumstances) must be based on consent or probable cause" (emphasis added); citing *United States vs. Brignoni-Ponce, supra,* at 881-882, 95 S.Ct., at 2580. It is submitted that this is precisely the situation presented herein. Nor does the government cite any case for its proposition that this brief detention permits the *initiation* of a search. (i.e. boarding of a vessel). Rather, the government casually sweeps the term "boarding" into the precise term, "investigatory stop".

This analysis belies the opinion in the case *sub judice.* It cannot be questioned that the majority opinion is premised *solely* on Title 19 United States Code §1581, (Pet. App., 13, 31, 38) yet the government makes only passing reference to this statute. (Brief, n.5) The government's approach is absolutely incorrect, for the majority opinion has established a precedent regarding the constitutional latitude of Section 1581, yet the government never addresses itself to this issue.[5]

If it were as simple a picture as the government paints, the majority would have avoided the extensive jurisprudence analysis utilized to bring this search within constitutional and statutory guidelines. The government, in effect, adopts the concurring analysis, which relies on *Brignoni-Ponce.* It should be noted,

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[1]This brief is filed pursuant to Rule 24(4), Rules of the Supreme Court.

[2]In n.3 of its brief, the government apparently raises a standing question. First, it should be noted that both petitioners were charged with possessory crimes, which gives each a sufficient interest to contest the search. *Rakas v. Illinois,* 439 U.S. 128, 135, 99 S.Ct. 421, 426, 58 L.Ed.2d 387, 396 (1978); *United States vs. Byers,* 600 F.2d 1130, 1132 (5 Cir. 1979). Second, *Rakas* was not law at the time of the seizure. See *Jones vs. United States,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). Third, this is the first time standing has been raised by the government and, thus, should be considered waived. See Rule 103, Federal Rules of Evidence.

[3]United States brief.

[4]Petition for Writ of Certiorari.

[5]In fact, contrary to the government's position, (Brief, n.6) *Brignoni-Ponce* was rejected by the majority as a basis to support the *boarding* of the vessel. (Pet. App., 12-13) Additionally, petitioners were not confused (See Brief, 7) as to the applicability of border search law; rather, both the majority and concurring opinion reject this doctrine due to insufficient proof of a border crossing. (Pet. App., 10-12, 35-36)

however, that Judge Rubin concurs *only* in the result, but totally disagrees with the means used to obtain it. That is, Judge Rubin views the majority's use of §1581 as having a "potentially dangerous impact on Fourth Amendment rights". (Pet. App., 34)

The second area of confusion focuses on the initiation of the search and the development of probable cause. The government consistently asserts that probable cause developed prior to the search; (Brief, 8-11) that is, the *boarding* of the vessel did not constitute the search. Therefore, arguendo, probable cause (smell of marijuana) developed prior to the search (opening of the hatch). It should be recalled, however, that no marijuana odor was detected while on shore.

This analysis, as with the "investigatory stop and boarding" area, appears to present the fundamental issue: what is the legal connotation and constitutional limitations of a customs BOARDING of a docket vessel previously seen traveling within this country's waterways. Despite the government's best efforts to bring this issue within established principles of law, thus eliminating the numerous conflicts,[6] this analysis also ignores the majority opinion.

[6]*Almeida-Sanchez vs. United States, supra; Carroll vs. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1924); *United States vs. Tilton,* 534 F.2d 1363 (9 Cir. 1976).

The Fifth Circuit found the boarding of the vessel to be the initiation of the search:

> "Probable cause did not accrue until after the officer boarded to search and smelled the marijuana. If the boarding for purposes of inspection or search is to be upheld, then, it must be on some other ground. . . ." (Pet. App., 13)

Furthermore, this finding comports with the facts:

> By Mr. Masin (defense counsel):
>
> Q Then what occured?
>
> By Mr. Whitmire (petitioner):
>
> A Then they asked for the registration for the boat. I showed them the registration. He says — one customs officer told the other one, "You watch him, I'm going to search the boat.[7]
>
> * * * * *
>
> By Mr. Geneson (prosecutor):
>
> Q Once you had received the undersigned registration and no identification from Mr. Williams, what did you do?

[7]Motion to suppress transcript, p.9.

By CPO Kinney:

A I advised Mr. Whitmire I was going to search his boat.

Q Then what did you do?

A I stepped down into the cockpit area of the boat. I could smell the heavy aroma of marijuana.[8]

It is clear that the majority opinion creates a serious conflict in an area of importance in federal criminal law. The government's analysis only highlights this conflict by its attempt to rewrite the majority opinion.

CONCLUSION

WHEREFORE, for the reasons stated in the Petition For Writ Of Certiorari,[9] petitioners respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the Fifth Circuit.

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[8]Motion to suppress transcript, p.23.

[9]Petitioners rely on the Petition for its response regarding the Magistrate delegation issue.